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No. 83-205

In the Supreme Court of the United States

October Term, 1983

CITY OF WAUWATOSA FIRE DEPARTMENT,
Petitioner,

v.

STANLEY ORZEL,
Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED IN SUPPLEMENTAL PETITION

4. Does 28 USC § 636, which confers judicial power upon the United States Magistrates pursuant to which the judgment below was entered, conflict with Article III of the United States Constitution thus making the judgment void?

PARTIES

Petitioner, City of Wauwatosa, is a municipality located in Milwaukee County, State of Wisconsin. Stanley Orzel is an assistant fire chief employed by the City. The City and Orzel are the only parties to this case.

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STATEMENT UNDER RULE 28.4(b)

Since the proceeding draws into question the constitutionality of an act of Congress, Title 28 U.S.C. § 631, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

No court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of such act of Congress has been drawn into question.

STATEMENT

Petitioner printed its Petition for Writ of Certiorari on August 5, 1983. It was filed August 8, 1983.

On August 5, 1983 the Ninth Circuit Court of Appeals held that the legislation that empowered U.S. Magistrates to perform judicial functions was unconstitutional. This supplemental petition is being filed within the 90 day period and adds a fourth issue to the Questions Presented in the original Petition.

The parties consented, in writing, to permit the Magistrate to try the case at bar (App. A-37). Thereafter, the U.S. Magistrate performed all of the judicial functions that would have been performed by the U.S. District Judge to which the case was originally assigned.

The Magistrate presided at the pretrial conferences; decided pretrial motions; presided at the trial; reviewed the post-trial briefs; heard oral argument; decided the issues presented; wrote the opinion; entered the Decision and Order for Judgment; and entered the Supplemental Orders for Judgment.

The appeal to the Court of Appeals was taken directly from the decision and judgment entered by the Magistrate pursuant to 28 USC § 636(c)(3). No U.S. District Judge reviewed or passed upon any of the actions taken by the Magistrate in this case.

No objection to this procedure was made by the Petitioner and the legal issue presented here was not presented to the Magistrate or to the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The issue presented is important in the administration of justice in the federal courts. Parties are being solicited to give their consent to have their cases heard and decided by these court officers. The constitutional limits on the exercise of judicial powers by these magistrates should be stated by this Court before other pending cases proceed to judgment. If the U.S. Magistrate cannot legally function in the manner outlined in 28 U.S.C. § 636(c), further use of that procedure should be quickly and expeditiously terminated.

ARGUMENT

This Court has held that judicial powers cannot be conferred by Congress upon persons other than Judges appointed pursuant to Article III of the U.S. Constitution. *Northern Pipeline Co. v. Marathon Pipeline Co.*, —U.S.—, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982).

The statutes which empowered the Magistrate to perform all of the functions of the U.S. District Judge in the case at bar are also unconstitutional. *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix,* Nos. 82-3152 and 82-3182 (9th Cir. August 5, 1983). The Ninth Circuit raised the constitutional issue itself.

Magistrates are not appointed under the procedures outlined in Article III of the Constitution. The U.S. District Judges make the appointments. 28 U.S.C. § 631.

Unless the parties consent to their acting with full judicial power, the U.S. Magistrates have only limited powers and their decisions are subject to review by the U.S. District Judge. However, the consent features contained in 28 U.S.C. § 636(c) do not save the statute from

constitutional impediment since jurisdiction cannot be conferred upon any Court by consent. This Court has consistently held that "the consent of the parties cannot give jurisdiction to the courts of the United States in cases where it has not been conferred by the Constitution and the laws." *Cutler v. Rae,* 7 How. 729, 12 L.Ed. 890 (1849). *See also Minnesota v. Northern Securities Co.,* 194 U.S. 48, 24 S.Ct. 598, 48 L.Ed. 870 (1904); *Exporters of Mfrs.' Products v. Butterworth-Judson Co.,* 258 U.S. 365, 42 S.Ct. 331, 66 L.Ed. 663 (1922); *Mitchell v. Maurer,* 293 U.S. 237, 244; 55 S.Ct. 162, 79 L.Ed. 338 (1934); *National Ass'n for the Advancement of Colored People v. New York,* 413 U.S. 345, 353, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973); *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978).

CONCLUSION

The judicial power of the federal courts can be exercised only by persons appointed and acting pursuant to Article III of the U.S. Constitution.

The decision and judgment entered below was not made by a person so appointed or empowered. It is very likely that the judgment is void for that reason.

Petitioner submits that this Supplemental Petition presents an additional issue which this Court should consider and decide on the merits.

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APPENDIX

APPENDIX TO THE SUPPLEMENT TO THE PETITION

28 USC § 631. Appointment and tenure

(a) The judges of each United States district court and the district court of the Virgin Islands shall appoint United States magistrates in such numbers and to serve at such locations within the judicial district as the conference may determine under this chapter. * * * Where there is more than one judge of a district court, the appointment, whether an original appointment or a reappointment, shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge. * * *

* * *

(c) Notwithstanding any provision of law to the contrary —

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. * * *

* * *

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.